

**From:** Jeff Sutton [mailto:jsutton@tccanal.com]  
**Sent:** Monday, January 14, 2013 5:38 PM  
**To:** comment, rulemakingprocess@DeltaCouncil  
**Subject:**

Ms. Cindy Messer  
Delta Plan Manager  
Delta Stewardship Council

Dear Ms. Messer:

On behalf of the Tehama-Colusa Canal Authority, I respectfully adopt and submit the attached comments offered by the Association of California Water Agencies on behalf of the TCCA as well.

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## Association of California Water Agencies

Leadership Advocacy Information Since 1910

January 14, 2013

Transmitted electronically:

[RulemakingProcessComment@deltacouncil.ca.gov](mailto:RulemakingProcessComment@deltacouncil.ca.gov)

Cindy Messer  
Delta Plan Program Manager  
Delta Stewardship Council  
980 Ninth Street, Suite 1500  
Sacramento, CA 95814

Subject: Regulatory Rulemaking Text of Proposed Regulation Cal. Code of Regulations, Title 23. Waters. Division 6. Delta Stewardship Council. Chapter 2.

Dear Chairman Isenberg and Members of the Council:

The Association of California Water Agencies (ACWA) appreciates the opportunity to submit the following comments regarding the text of the Proposed Regulations (11/16/2012). ACWA has been engaged in the Delta Stewardship Council (Council) process since its inception, both in its own capacity and in collaboration with a broad coalition of public water agencies, cities, associations and other interested groups located above, within, and below the Bay-Delta known as the Ag-Urban Coalition, to provide substantive comments to help inform this process. Although unanimity is difficult to achieve among such diverse interests, our fundamental concern has been, and continues to be, that the Delta Stewardship Council has chosen to rely upon an essentially *regulatory approach* to achieving its objectives that is beyond the Council's limited legal authority. Instead, we have urged the Council to provide the leadership for an integrated management approach that relies upon *collaboration with and leveraging of existing authorities* of the many state and federal agencies and local interests that all share common interests in the Bay-Delta. We have raised this fundamental concern, that the Council should focus more on integrating and less on regulating, in each of our comment letters, in oral testimony, and in numerous meetings throughout this process.

It is in this context that ACWA offers these comments on the Proposed Regulations, which we believe, regrettably, reinforce an excessive regulatory approach to the duties of the Council. ACWA is committed to the achievement of the coequal goals of statewide water supply reliability and the restoration of a sustainable Delta ecosystem while protecting and enhancing the unique cultural, recreational, natural resources and agricultural values of the Delta as an evolving place.

Further, we are committed to working with the Council to assure that the proposed regulations are consistent with the authorities granted to the Council by its enabling legislation, and in accordance with the procedural and substantive requirements of the Administrative Procedure Act (APA) as well as the regulations and guidance adopted by the Office of Administrative Law (OAL). Unfortunately, as we have commented consistently throughout the Delta Plan process, the regulatory approach has been flawed from the outset and these proposed regulations only accentuate those flaws.

For the Council to be successful in furthering the coequal goals within a sustainable and coherent governance structure, it must adopt clear, focused policies in accordance with OAL requirements and other state laws and regulations. The proposed text for addition to Title 23 of the California Code of Regulations fails this standard and instead itself creates obstacles to such progress. Moreover, the Council may only promulgate regulations within that specific authority granted to it by the Delta Reform Act (Act). In this respect, the proposed regulations also fail by overstepping that authority.

Many ACWA member agencies and others are submitting comprehensive and detailed comments on the Council's proposed regulations. Although we do not provide that here, our review of the proposal has led us to conclude that much needs to be corrected, revised or deleted to satisfy OAL criteria, to make the Delta Plan consistent with legislative intent, and to reflect the Council's statutorily defined role in furthering the coequal goals. To illustrate our perspective, we provide some general comments and specific examples of proposed Code sections with deficiencies below.

Many sections of the proposed regulatory language are inconsistent with the standards in the APA, including the "authority," "necessity," "non-duplication," and "consistency" standards set forth in Government Code section 11349.1, and corresponding definitions in section 11349. The proposed regulations include a significant amount of unnecessary narrative language and statements of policy that diminish the binding impact of the regulations more appropriately found in the Delta Plan. This creates difficulty for potentially regulated entities to discern precisely what would be required to comply with the regulations. It is imprudent to begin a new regulatory process in a manner which clouds rather than clarifies the objectives of the regulations. We therefore urge the Council to remove narrative and policy language in the proposed regulatory text. Further, unclear areas of the Final Draft Delta Plan that will be revised to reflect improved clarity, should be mirrored in the proposed regulations.

The Council should also use terminology in the regulations that is specifically defined in the Water Code. The structure and depth of the definition section is both inappropriate and confusing and is not helpful in proposed regulations. New definitions are excessively long and complex and include "actionable language" that makes it very difficult to discern the extent of the prescriptive or regulatory intent of the substantive provisions. The definitions should be clear and concise, defining only necessary terms. Further, regulatory requirements should not be embedded within a definition.

Administrative regulations are enacted to implement, interpret or carry out the provisions of a statute, and should not alter, amend or enlarge statutes lest they will confuse or otherwise impair

a statute's scope or purpose. The Notice of Proposed Rulemaking sets forth twenty-four provisions of the Water Code that the proposed regulations are intended to implement, interpret or make specific. It further notes that the regulations make reference to more than twenty-four other provisions of the Water Code, as well as one provision of the Public Resources Code, several provisions of the federal Clean Water Act, Endangered Species Act, and National Flood Insurance statutes, and the CEQA regulations.

Many policies the proposed regulations seek to enforce, implement, or interpret, are statutory directives beyond the scope of the Council's authority. Moreover, the Act's actual provisions that most of the proposed regulations purport to implement, interpret, or carry out do not provide or imply the granting of such specific authorities or powers to the Council. Instead, they are articulations of general state policies or elements or objectives that should be included in the Delta Plan, but do not provide a foundation for the prescriptive regulations.

The APA requires OAL to review regulations using standards of: (1) necessity; (2) authority, (3) clarity; (4) consistency; (5) reference; and (6) nonduplication. (Gov. Code, § 11349.1(a).) Many of the proposed regulations do not meet these standards, are not necessary to effectuate the Act and many exceed the Council's authority. Some of the language is also not written in a manner that can be easily understood by the targeted entities, and in some cases it is difficult to even discern which entities are targeted by the provisions. (Gov. Code, §§ 11349.1(a)(3), 11349(c) ["Clarity means written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them."].) Several provisions also overlap or duplicate the requirements of other state and federal laws. (Gov. Code, §§ 11349.1(a)(6), 11349(f).) Below are examples of flaws contained in the draft regulatory language that must be revised to meet the APA standards.

**Section 5001(e) – The definition of “coequal goals”** is already succinctly defined in Water Code §85054. The new definition is unnecessary, confusing and over a page and a half in length, while the definition in statute is just two sentences. The new definition does not provide clarity or interpret the existing definition found in the Water Code. The new definition contains three “further defined” phrases, which have their own separate definitions in Section 5001(e), as well as other terms defined separately in Section 5001. The second sentence of the definition uses prescriptive regulatory language to express how the goal “shall be achieved” and then the definition goes on to define “achievement,” including language establishing prescriptive requirements applicable to “regions that use water from the Delta watershed” and to undefined entities. The structure of mixing definitions and regulatory language is confusing to the potentially regulated community.

As we pointed out “coequal goals” is already defined by statute (CWC §85054) and it is not clear why it is also necessary to define “achieving the coequal goals.” Subparagraphs (e)(1)-(3) appear to be expressing either the Delta Stewardship Council's aspirations, or statements of intent regarding what it hopes to promote through implementation of the Delta Plan, rather than adding any clarity. These sections do not add clarity and, as a component of regulatory text are unnecessary.

Subparagraphs (e)(1)(A)-(C) use vague and relative terminology such as “better matching” “more closely match” and “reduce their reliance” which make it difficult for a potentially regulated entity to understand how these “definitions” will apply in a coherent and reasonable regulatory setting.

In addition, language in subparagraphs (e)(1)(A) and (e)(1)(B) is duplicative in many respects, differing only in the general applicability to undefined entities and “regions that use water from the Delta watershed.” To the extent that these definitions are establishing prescriptive mandates, they find no support in the general statement of State policy in Water Code §85021. Water Code §85021 is a general statement of legislative policy that the Council has no authority to expand or use as a basis to limit basic water management activities. In short, they are regulations that the Council has no authority to promulgate.

Moreover, subparagraphs (e)(3)(A)-(F) set forth numerous “strategies” for protecting the unique values of the Delta, without explaining specifically how these strategies relate to “achievement” of the coequal goals or assist in interpreting or further clarifying the statutory definition. This language should, at a minimum, be removed from the definition section and removed entirely from the regulatory language.

**Section 5003 – Covered action defined.** Similar to the enhanced definition of “coequal goals,” this definition is already defined in Section 85057.5 and now sets forth unclear substantive regulatory requirements.

Section 5003(b)(2)(C) exempts one-year transfers from being considered a covered action, which is consistent with Section 1729 of the Water Code. However, Section 5003(b)(2)(C) sunsets the exemption on 1/1/2015, creating a limitation that is not consistent with Section 1729 of the Water Code. This is a confusing and inconsistent regulatory requirement that could result in an agency undertaking an environmental review of a one-year transfer to satisfy the requirements for certifying consistency with the Delta Plan, even though the legislature has exempted these from the requirements for CEQA review.

Additionally, section 5003(b)(2) contains narrative expression of the Council’s intent and examples, and is therefore unnecessary. It does not provide clarity for the regulated community does not meet the standards of necessity for regulatory language and must be removed.

Section 5003(c) should not include prescriptive requirements applicable to state and local agencies and section 5003(d) should not include the clause that limits “the application of the definition.” This is language is structured in a manner that renders the regulatory requirements unclear to the regulated community.

ACWA urges the Council to revise the proposed draft regulations to comply with the APA standards.

Again, these comments are intended to provide examples of essential problems with the regulations, rather than be comprehensive. We also urge the Council to also consider and implement those comments submitted separately by ACWA and Ag Urban Coalition members.

ACWA remains committed to this process and continues to support the Council in its efforts to develop, adopt and implement a sustainable Delta Plan and regulations consistent with its duties and authorities provided for in the Delta Reform Act.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Timothy H. Quinn", with a stylized flourish at the end.

Timothy H. Quinn  
Executive Director